

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

Richmond Division

MCCAIN-PALIN, 2008, INC.

Plaintiffs,

v.

Case No. 3:08cv709

JEAN CUNNINGHAM, *et al.*,

Defendants.

**SUPPLEMENTARY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

The defendants, Jean Cunningham, Nancy Rodrigues, and Harold Pyon (the “Defendants”), the members of the Virginia Board of Elections, in their official capacity, by counsel, moved to dismiss this matter. The Court advised the parties that they may file supplements to their previously-filed memorandums, which the Defendants now do.

This filing is not a response to the proposed intervention by the United States Department of Justice; that will be addressed in a separate filing.

**Response to Plaintiffs’ Supplemental Memorandum**

The plaintiffs argue that the Virginia statute providing for 45-day advance mailing of absentee ballots involves a federal issue because of an excerpt from a three-Justice concurring opinion in *Bush v. Gore*, to wit: “[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J. joined by Scalia and Thomas, JJ., concurring). The problem with the plaintiffs’ argument is that, as pointed out in the Defendants’ initial memorandum, there is no explicit federal legislative scheme requiring

45 days advance mailing of absentee ballots. The 45 day period is a matter of Virginia law, not federal law. That is why it cannot be enforced under 42 U.S.C. § 1983.

**Section 1973ff-2 Addresses Plaintiffs' Concerns**

Moreover, not only is there no federal right to having absentee ballots mailed out a certain amount of days prior to an election, as the plaintiffs assert, there is a federal statute that addresses, and resolves, the precise concerns raised in this lawsuit. 42 U.S.C. § 1973ff-2 prescribes a procedure for UOCAVA voters to follow if they “make timely application for, and do not receive, States’ absentee ballots.” *Id.* That procedure is for the UOCAVA voter to submit a Federal write-in absentee ballot.

In other words, Congress prescribed a remedy for UOCAVA voters if they do not receive absentee ballots in a timely fashion. Moreover, the responsibilities assigned to the States in 42 U.S.C. § 1973ff-1 expressly omit an obligation to mail absentee ballots to UOCAVA voters a minimum number of days before an election.

Accordingly, in addition to the fatal flaws in the complaint previously pointed out, the relief requested by the plaintiffs (the 10-day extension for counting absentee ballots): (i) is not relief permitted by UOCAVA; (ii) does not relate to any specific obligation imposed on the States by Congress, and (iii) in any event, is unnecessary because Congress already foresaw this potential problem in § 1973ff-2 and established a statutory remedial scheme to address it. Further relief from this Court is therefore unauthorized by UOCAVA as well as unnecessary. All citizens, including UOCAVA voters, are presumed to know the law. If UOCAVA voters did not exercise their express right to submit a Federal write-in ballot pursuant to § 1973ff, that omission, whatever the reason,

is not a basis for this Court to change the election laws of the Commonwealth of Virginia to accommodate them.

The Court should dismiss the case, with prejudice.

JEAN CUNNINGHAM, *et al.*

By       /s/        
Counsel

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**Certificate of Service**

I certify that on November 14, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

By:       /s/        
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